Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1990

SAMUEL CAVALIERI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SAMUEL CAVALIERI,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Samuel Cavalieri respectfully prays that a Writ of Certiorari issue to review the final judgment of the Court of Appeals of the State of New York, as amended, and entered January 12, 1972 (appendix A, infra) which affirmed an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered April 15, 1971, modifying and as modified affirming a judgment of conviction rendered against the petitioner in the Supreme Court of the State of New York, held in and for Bronx County on June 26, 1970, convicting the petitioner for criminal contempt, in violation of section 215.50 of the Penal Law of the State of New York, subdivision 4 thereof, a misdemeanor, 39 McKinney's Con-

solidated Laws of New York page 738*, and sentencing the petitioner for a term of imprisonment for one year.

The Court of Appeals of the State of New York affirmed the said order of the Appellate Division of the Supreme Court of the State of New York, First Department, without an opinion. The Supreme Court of the State of New York Appellate Division, First Department, rendered an opinion which is reproduced herein in appendix "B" infra. The opinion is reported officially in 36 A.D. (2) 284; 320 N.Y.S. (2) 390.

The judgment and order of the said Court of Appeals of the State of New York affirming the aforementioned order of the said Supreme Court of the State of New York, Appellate Division, First Department, is not as yet reported.

JURISDICTION:

The judgment and order of the Court of Appeals of the State of New York was made and entered on November 17, 1971, and was subsequently amended to show that such Court passed upon questions under the United States Constitution as to whether the rights of the petitioner under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution were denied.

The judgment and order of the Court of Appeals of the State of New York was entered November 17, 1971, and was amended January 12, 1972. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22(1) of the Rules of the Supreme Court of the United States.

*( ) This statute was since superceded by section 215.50 subdivision 4 and 215.50 1, of the Penal Law of the State of New York, since September 1, 1970, by the Laws of 1970, Chapter 734, Section 1, and 2.

THE QUESTIONS PRESENTED

1. Was the petitioner fully advised of the State statutory immunity (section 619-c of the Code of Criminal Procedure of the State of New York) so that the requirements of the Fifth Amendment privilege against self incrimination were met?

2. Was the appellant deprived of right of counsel when he was summoned to appear as the Grand Jury witness and requested an extention of time to retain counsel?

CONSTITUTIONAL AMENDMENTS:

Amendment V. "....; nor shall be compelled in any criminal case to be a witness against himself,...."

Amendment VI "In all criminal prosecutions the accused shall enjoy the right...;... and the Assistance of Counsel for his defense."

Amendment XIV "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protections of the law."

Code of Criminal Procedure of the State of New York Section 619-c:

2. "Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty

or forfeiture for or on account of any transaction, matter or thing which in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him in any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt. **

Section 215.50 of the Penal Law of the State of New York.

"A person is guilty of criminal contempt when he engages in any of the following conduct: 1. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding, or after being sworn, to answer any legal and proper interrogatory; or....

"Criminal contempt is a class "A" misdemeanor....."

STATEMENT OF THE CASE

The indictment in this case originally charged the petitioner with 27 counts for contempt based on the petitioner's refusal to respond to questioning before a Bronx County Grand Jury. Each count was based on a distinct refusal to answer a distinct question (4-84)***

**That section relevant and in effect at the time of the action involving the petitioner has since been repealed and superseded by Section 50.10 of 11A McKinney's Consolidated Laws of New York, page 145, effective September 1, 1971.

***This refers to the pagination of the record on appeal.

Upon appeal to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, the judgment of conviction was modified to the extent that the petitioner's repeated refusals constituted but one contempt; *People v. Cavalieri*, 36 A.D. (2) 284, 320 N.Y.S. (2) 390, 392.

At trial the Grand Jury minutes reflecting the petitioner's appearance before that body were received in evidence (113-129). The subject matter of the Grand Jury inquiry was an investigation into illegal gambling and usury, and whether the proceeds from gambling and usury were used to infiltrate "legitimate business" (131).

On March 7, 1969, the petitioner appeared before the Grand Jury (131). He was asked his name and address (131-132). The petitioner refused to answer all other questions propounded to him, asserting his privilege against self-incrimination (132).

After the petitioner claimed his privilege, the petitioner was excused. In petitioner's absence the Grand Jury voted to grant him "immunity" (132,133).

The interrogation of the petitioner was resumed after the conferral of immunity. The petitioner asserted his privilege against self-incrimination when he was asked further questions by the prosecutor (133, 134). After the petitioner thus refused to respond, the foreman of the Grand Jury directed the petitioner to answer (134).

However, the foreman of the Grand Jury at trial was asked what 'transactional immunity was" and the foreman replied he didn't know (138). When counsel inquired whether the foreman of the Grand Jury knew what "testimonial immunity" was, the Court then sustained an objection made by the District Attorney (138).

In his appearance before the grand jury, the petitioner was never advised he had a right to counsel (143).

The foreman of the Grand Jury a witness at the trial recalled that he heard "immunity" explained ten years prior to the trial (148-149). The explanation of "immunity" by the prosecutor to the petitioner when he appeared before the Grand Jury is spread out on pages 115-117 of the record on appeal.

For this Court's convenience that explanation is set forth herein as follows:

> "Q. I didn't ask you a question yet, Mr. Cavalieri. You will have the opportunity to claim any privilege you so desire. Before you claimed your privilege, when asked what is your business or occupation and you refused to answer. I tell you now, the Foreman of the Grand Jury has told me to tell you that the Grand Jury has voted to give you immunity. Now when the Grand Jury votes to give you immunity, it means that you are directed to answer questions by the foreman of the Grand Jury, and since you have been granted immunity, anything you say under oath, and you have been sworn as a witness before the grand jury, cannot be used in evidence against you. It also means if you say anything we can get a lead from, that may hurt you in some criminal way, that cannot be used in evidence against you."

> "So that in effect, you cannot be prosecuted because of anything you say. There are two things the Grand Jury cannot give you immunity for. Perjury, and criminal contempt...."

> "By that I mean, you must answer the questions because there is no reason you cannot answer the

questions at this time, since you cannot be prosecuted for it. That means you are getting before this Grand Jury, you are getting a bat. You are being walked away from any possible prosecution, for anything that you say before this Grand Jury cannot be used against you. I'm telling you this so you are fully aware and realize what the circumstances are." (pages 115-116).

At trial the petitioner testified in his own defense. He was 59 years of age. He suffered a prior conviction under the Harrison Act (199-200). However, he was never convicted for gambling or other crimes (200).

The petitioner's schooling was to the sixth grade and he never had any other schooling besides that (201).

On March 7, 1967, the petitioner was summoned to this Grand Jury (201, 202). A district attorney named Rotker that day spoke to him. At such time the petitioner was not represented by counsel (202). The petitioner told the District Attorney that he had no attorney and that he wanted counsel. The prosecutor told him that it made no difference and told him to appear before the grand jury (203) (204). This conversation occurred outside the Grand Jury Room (205).

The prosecutor at such time never afforded petitioner time to engage counsel.

The petitioner further related at trial that he didn't understand what "immunity" was. (203). Nor did the petitioner know why he was subpoenaed to the Grand Jury. At such time the petitioner desired counsel (205).

The petitioner further testified that nobody offered to obtain counsel for him. (205). Furthermore, petitioner was

never taken before a Judge for a direction to answer (205, 206). The foreman of the Grand Jury never explained "immunity" to petitioner (206).

On cross-examination, petitioner testified he could not recall whether he was previously convicted for gambling and usury (207).

Further cross-examination disclosed that prior to the crucial appearance on March 7, 1969, before the Grand Jury, the petitioner was previously subpoenaed (210). Thus, the first time the petitioner was subpoenaed he was excused and then re-subpoenaed (211). This happened three times before (211, 212). The petitioner did not at such times contact a lawyer because he felt he didn't need a lawyer (212-213).

Petitioner further testified that he realized that he needed counsel on March 7, 1969, when he was questioned. He then understood the need for counsel (214-215).

REASONS FOR GRANTING THE WRIT

I

THE PETITIONER WAS NOT OFFERED AN IMMUNITY THAT WAS COEXTENSIVE WITH THE FUNDAMENTAL RIGHT OF SILENCE GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND THE PROSECUTOR'S EXPLANATION OF "IMMUNITY" WAS SO CONFUSING THAT PETITIONER DID NOT WILFULLY REFUSE TO RESPOND TO THE QUESTIONING AND HAD A RIGHT TO REMAIN SILENT:

The petitioner never had a lawyer to advise him of what "immunity" was.

As will be shown hereafter, the prosecutor's explanation of immunity was ambiguous and confusing and supported a conclusion that the immunity offered was limited to testimonial or "use" immunity and did not extend the full and complete transactional immunity.

The prosecutor, an officer of the state, clearly had a duty to explain the immunity in a proper and simple way for the petitioner, an uneducated layman, to understand just exactly what was transpiring.

As was stated in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314,

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not going to show in a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilty shall not escape or innocent suffer. ....": 88 of 295 U.S.

It alleged, the prosecutor, an attorney having assumed the duty to inform the petitioner what the so-called "immunity" consisted of the prosecutor had a duty to advise the petitioner correctly. In *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012, 79 S.Ct. 968 (1959) it was stated on page 539 of 359 U.S. that:

> ". . . . since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he has formulated..."

It would seem therefore, since the prosecutor followed a course of conduct and a de facto rule as to advising the petitioner as to immunity, that the prosecutor should have explained immunity clearly, succinctly and concretely and the prosecution therefore should have been held to the fundamental fairness of the law; thus, in *Yellin v. United States*, 374 U.S. 109, 10 L.Ed. (2) 778, 83 S.Ct. 1828 (1963) it was stated on page 124 of 374 U.S. that:

> ". . . . the Committee prepared the ground work for prosecution. . . . . it is not too exacting to require that the Committee be equally meticulous in obeying its own rules."

To supplant the Fifth Amendment right of silence the "immunity" must be as coextensive as the fundamental right. See *Counselman v. Hitchcock*, 142 U.S. 547, 35 L.Ed. 1110, 12 S.Ct. 195 (1892).

The explanation of immunity in this case, by the prosecutor was and is inexplicable. The prosecutor initially explained immunity as forbidding a use of any of the compelled testimony sought from the petitioner, or any lead therefrom (115). Then the prosecutor stated "in effect" that petitioner couldn't be "prosecuted because of anything you say" (116). The expression "in effect" was ambiguous and not explicit.

Proceeding further, the prosecutor added that petitioner ". . . must answer the questions, because there is no reason you cannot answer the questions at this time, since you cannot be prosecuted for it. That means that what you are getting before this Grand Jury, you are getting a bat. You are being walked away from any possible prosecution, for anything that you say before the Grand Jury cannot be used against you. . . ." (116), see pages 6-7 , *supra*.

The immunity thus explained was garbled and clearly qualified the attempted grant of transactional immunity, because the prosecutor concluded that the evidence cannot be used against you . . . "

Thus, the explanation of immunity as an amnesty from prosecution for answering was explained merely in terms of "use" or testimonial immunity. Not only that, but in attempting to explain "transactional immunity" the prosecution omitted and failed to explain that the petitioner could not be prosecuted on the basis of any leads or any matters that might flow from any answer or evidence he would give. In other words, that the petitioner was immunized from prosecution for any answers he gave that might relate to any possible crime. See *People v. Masiello,* 28 N.Y. (2) 287; 321 N.Y.S. (2) 577; *People v. Mulligan,* 29 N.Y. (2) 20; 323 N.Y.S. (2) 681; *People v. Tramunti,* 29 N.Y. (2) 28, 323 N.Y.S. (2) 687.

In effect, the language and explanation of the prosecutor, as to "immunity" constituted an absence of immunity justifying the petitioner for relying on his privilege against self-incrimination. As was stated in *Stevens v. Marks,* 383 U.S. 234, 15 L.Ed. (2) 724, 86 S.Ct. 788 at page 246 of 383 U.S. that:

> ". . . . the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him. . . ."

II

THE PETITIONER WAS ENTITLED TO COUNSEL WHEN HE APPEARED BEFORE THE GRAND JURY AND PETITIONER SHOULD HAVE BEEN AFFORDED TIME TO PROCURE COUNSEL:

The petitioner was unrepresented by counsel when he appeared before and submitted to the interrogation by the Grand Jury. The right to counsel is based on the Sixth and Fourteenth Amendments to the Federal Constitution. It is put, that petitioner was not in contempt because he desired counsel and he was not given an opportunity to get counsel and was completely ignorant of the proceedings. This was compounded by the explanation of the so-called immunity given by the trained prosecutor.

The function of counsel would be two-fold. Counsel could have explained the issue of the irrelevancy of questions; counsel could have also explored the issue of immunity; see *People v. Ianniello*, 21 N.Y. (2) 418; 288 N.Y.S. (2) 462, at pages 423-425 of 21 N.Y. (2).

The facts of this case show that the petitioner was ignorant having only attained the sixth grade of school (201). Ironically, the Grand Jury assistant foreman who testified at the trial did not know what transactional immunity was (138).

However, this petitioner stands convicted for contempt because he persisted in refusing to answer the question when there was an open question as to the extent of the immunity. More was therefore demanded from the petitioner than from the Grand Jury foreman who testified for the prosecution.

The petitioner made known to the District Attorney that he

desired counsel (202-205).

It would appear that the fundamental right to counsel has been considered by this Court from the aspect of the utility of counsel and a relevancy of a lawyer's advice.

In *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. (2) 694, 86 S.Ct. 1602 (1966), it was held that the right to counsel is fundamental at a time when an accused is subjected to custodial questioning. In *U.S. v. Wade,* 388 U.S. 218, 18 L.Ed. (2) 1149, 87 S.Ct. 1926 (1967), it was held that an accused has a right to counsel at a custodial pre-trial line-up conducted for identification. Counsel it was held would insure the fairness of the line-up.

Similarly, in this case, counsel would have been of great aid to the petitioner in explaining what proper immunity consisted of and whether the petitioner had a right to refuse to answer.

Instead, the Courts below held that the petitioner knew his rights and didn't need a lawyer. It seems difficult to understand how the assertion of one constitutional right by a person can work a forfeiture of another constitutional right. Moreover, there is a presumption against a waiver of a fundamental right. See *Johnson v. Zerbst,* 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938).

CONCLUSION

FOR THE ABOVE STATED REASONS A WRIT OF CERTIORAI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Respectfully submitted,

Arnold E. Wallach
Attorney for Petitioner

Dated: April 6, 1972

APPENDIX A

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twelfth day of January A.D. 1972.

PRESENT, HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. No. 5

The People &c.,

Respondent,

vs.

Samuel Cavalieri,

Appellant.

A motion for reargument and/or to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied insofar as it seeks reargument, and it is

ORDERED, that the said motion be and the same hereby is granted insofar as it seeks amendment of the remittitur; the return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

Appendix A

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the defendant under the fifth, sixth and fourteenth amendments were denied. The Court of Appeals held that there was no such denial of defendant's constitutional rights.

AND the Supreme Court, Bronx County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

s/Kimball
Deputy Clerk

APPENDIX B
Decision of Appellate Division

Harold A. Stevens, P.J.,
Louis J. Capozzoli,
Arthur Markewich,
Theodore R. Kupferman,
Aron Steuer, JJ.

Appeal from a judgment of the Supreme Court of Bronx County (David Ross, J.), without a jury, rendered June 26, 1970, convicting defendant of Criminal Contempt [Penal Law § 215.50] and sentencing him to serve a term of one year in the New York City Correctional Institution for Men.

Arnold E. Wallach of counsel (Joseph Panzer, attorney) for appellant.

Daniel J. Sullivan of counsel (Burton B. Roberts, District attorney) for respondent.

STEVENS, P.J.:

Even though immunity was conferred by the Grand Jury and the meaning thereof explained in simple language, there was a continuing, considered and contumacious refusal by defendant to answer questions which we find to be clearly relevant to the stated purpose of the inquiry. The defendant was informed that no testimony, truthfully given, could be used against him and, further, any lead obtained from such testimony that might hurt him "in some criminal way" could not be so used. Moreover, it was made clear to the defendant that he was not the target of the investigation. Immunity when conferred by the Grand Jury includes both testimonial and transactional immunity (cf. Code of Criminal Procedure § 619-c; *Gold v. Menna*, 25 N.Y. 2d 475).

From the defendant's own testimony he understood that he was being subpoenaed to testify as a witness before the Grand Jury. Since he received several subpoenas and appeared pursuant thereto prior to the date of actual testimony, there was ample opportunity to consult with counsel had defendant so desired. Nor did he, on the occasion of his actual appearance before the Grand Jury, ask to be excused from the Grand Jury room in order to consult counsel. Indeed, if, as defendant asserts, he did not at any time confer with counsel prior to his appearance, defendant was remarkably alert and precise in asserting his constitutional privilege against self-incrimination. Defendant admitted that he understood at least certain of the questions, which he refused to answer. Immunity having been properly conferred, defendant had no right to remain silent *(Gold v. Menna, supra)*. Nor do we find the sentence of one year to be excessive.

The judgment entered June 26, 1970, should be modified on the law, to the extent of holding that the refusal of defendant to answer the questions contained in the multiple count indictment constituted, in effect, a single contempt with a maximum sentence of one year since all referred to a single area of inquiry, and it became clear, at the outset, that defendant would refuse to answer any questions *(cf. People v. Chestnut*, 26 N Y 2d 481, 491-492). As so modified, the judgment appealed from should otherwise be affirmed.

All concur except Capozzoli, J., who dissents in a dissenting opinion.

Appendix B

CAPOZZOLI, J. (DISSENTING):—

This is an appeal from a judgment convicting the defendant of criminal contempt (Penal Law § 215.50), after a non-jury trial. The conviction is based on a refusal of the defendant to answer questions before a Bronx County Grand Jury.

The Grand Jury was engaged in an investigation of "a conspiracy to violate the gambling laws, loan sharking, taking of money illegally and putting them into legitimate business in Bronx County". (R-115). The District Attorney, after having informed the defendant of the purpose of the investigation by the Grand Jury, addressed the defendant, in the presence of the Grand Jury, as follows:-

> "I tell you now, the foreman of the Grand Jury has told me to tell you that the Grand Jury has voted to give you immunity. Now, when the Grand Jury votes to give you immunity, it means if you are directed to answer questions by the foreman, of the Grand Jury, and since you have been granted immunity, anything you say under oath, and you have been sworn as a witness before the Grand Jury, cannot [sic] be used in evidence against you. It also means if you say anything that we can get a lead from, that may hurt you in some criminal way, that cannot be used in evidence against you."

After having made this statement to the defendant the District Attorney followed it up with the following:—

> "So that in effect, you cannot be prosecuted because of anything you say." (R-116).

Later, on the same page, the District Attorney further said:—

"By that I mean, you must answer questions, because there is no reason you cannot answer the questions at this time, since you cannot be prosecuted for it. * * * You are being walked away from any possible prosecution for anything that you say before this Grand Jury cannot be used against you."

Following the last quoted statement of the District Attorney, the defendant refused to answer all questions put to him on the ground that the answers would tend to incriminate him. The majority holds that immunity was conferred by the Grand Jury and that the failure of the defendant to answer questions thereafter was contumacious and contemptuous.

It is, of course, well settled that both Amendment V of the U.S. Constitution and New York State Constitution, Article I, § 6, protect one from being compelled to be a witness against himself. The New York statute, which bears upon this subject, was enacted in 1967 and is to be found in the Code of Criminal Procedure, § 619-c, and is derived from § 2447 of the former Penal Law.

It prescribes the type of immunity that must be granted to a witness before he may be compelled to surrender his constitutional privilege against self incrimination and it also specifically designates those who are authorized to grant immunity. What is extremely important is the fact that it directs "* * * such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority he gave answer or produced evidence, * * *". (Code of Criminal Procedure § 619-c, subd. 2.)

Appendix B

It is to be noted that there is a very important distinction between transactional immunity and testimonial immunity. The latter, sometimes known as "use" immunity, protects one from using the testimony itself in any subsequent criminal proceeding. On the other hand, "transactional" immunity, under the last quoted section, is far more reaching and gives "absolute immunity against future prosecution for the offence to which the question relates". *(Counselman v. Hitchcock*, 142 U.S. 547, 586.)

It has been repeatedly held that the immunity is not adequate if it does no more than assure that the testimony will not be used in evidence against one in a criminal prosecution. To force disclosure the immunity must be so broad that the risk of prosecution is ended altogether. Nor is he required to show, in order to make his privilege available, that the testimony which he declines to give is certain to subject him to prosecution. *(Matter of Doyle, 257 N.Y. 244.)*

In the last cited case, at pp. 250, 251, Chief Judge Cardozo said:—

> "The appellant is, therefore, privileged to refuse to answer questions that may tend to implicate him in a crime, unless by some act of amnesty or indemnity, or some valid resolution equivalent thereto, he has been relieved from the risk of prosecution for any felony or misdemeanor that his testimony may reveal. The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling

lips, the immunity must be so broad that the risk of prosecution is ended altogether. (Citing cases.)".

Again, at p. 257, the Court said:—

"* * * The immunity must be as broad as the privilege destroyed."

It therefore becomes important to consider what was said to this defendant on the basis on which the prosecution and the majority are convinced that proper immunity was conferred. It must clearly appear that the witness is being offered transactional immunity, as distinguished from testimonial or use immunity. As was said by the Court in *People v. DeFeo*, 308 N.Y. 595, at p. 600:—

> "The validity of the proceeding depends on whether the immunity conferred at the December 4th hearing was complete and coextensive with his constitutional protection against self incrimination as found by the court below or, as claimed by the defendant, was qualified and restricted by the limitation mentioned by the foreman of the Grand Jury. In other words, was the immunity granted as broad as the peril?"

As has been indicated, the District Attorney, in communicating to the defendant the instructions of the Grand Jury foreman that the Grand Jury voted to give him immunity, said "if you are directed to answer questions by the foreman of the Grand Jury * * * anything you say under oath * * cannot be used in evidence against you. It also means if you say anything that we can get a lead from, that may hurt you in some criminal way, that cannot be used in evidence against you." It is true

that, following the last quoted language, the District Attorney said: "So that in effect, you cannot be prosecuted because of anything you say". But this was his interpretation of what the Grand Jury foreman had offered to the defendant. What had been offered was not complete transactional immunity, but assurance that nothing the witness would say under oath would be used in evidence against him. There was not even a reference to the particular section involved in this proceeding, viz: 619-c of the Code of Criminal Procedure. The least that can be said about the language used by the District Attorney is that it was confusing and equivocal.

It is, of course, true that the Grand Jury proceeding was not a prosecution of the witness, but, rather, a general investigation. Hence, it has been held that the witness has no right to be represented by counsel in the technical sense. *(People v. Iannello*, 21 N.Y. 2d 418.) However, under the circumstances of this case, the least that should have been done with this defendant was to arraign him before a Judge who might have given him the proper advice as to the type of immunity to which he was entitled. While the defendant testified that he asked for counsel, even if he did not do so, the proper and fair thing to have done was to see that he obtained counsel to be properly advised. As the Court said in *People v. Iannello, supra*, at p. 424:—

> "* * * in light of current recognition of the importance of counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer. (cf. Miranda v. Arizona, 384 U.S. 436, 475, Escobedo v. Illinois, 378 U.S. 478, 486; People v. Donovan, 13 N.Y. 2d 148, 153).

* * * *

Appendix B

"* * * The legal rights which may be critically affected before the Grand Jury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self incrimination. * * * The witness who is not a target of the inquiry faces an even more critical decision for, unless he claims his privilege and thereby invokes immunity, his statements can be used against him substantively. Faced with a confusing variety of rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer."

It is true that this defendant had received several Grand Jury subpoenas for prior days, but he was never brought into the Grand Jury room until March 7th, 1969, the day when the alleged contempt took place. That is the day that he was offered this so-called immunity which is now under attack. That was the time when he was in need of legal advice as he did not know what his rights were after having been addressed by the District Attorney on the subject of immunity. In such a highly technical situation, where he had to understand the difference between transactional immunity, as distinguished from testimonial immunity, it is too much to expect that this defendant should have made a decision without the advice of counsel. In fact, the foreman of the Grand Jury, when asked if he knew the meaning of transactional immunity, answered truthfully and to the point "no". (F-138)

Since the complete immunity contemplated by § 619-c was not offered to this defendant by the Grand Jury, he was justified in continuing to assert his privilege.

For the reasons stated, I would reverse the judgment of conviction and dismiss the indictment.

APPENDIX C
Judgment of Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

PRESENT—
Hon. Harold A. Stevens, Presiding Justice,
Louis J. Capozzoli,
Arthur Markewich,
Theodore R. Kupferman,
Aron Steuer, Justices.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, Bronx County (Ross, J.), rendered on June 26, 1970, convicting defendant, after trial without a jury, of Criminal Contempt, and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Daniel J. Sullivan of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the judgment so appealed from be and the same is hereby modified, on the law, to the extent of holding that the refusal of defendant to answer the questions contained in the multiple count indictment constituted, in effect, a single contempt with a maximum sentence of one year. As so modified, the judgment is affirmed. [One of the Justices dissents in an Opinion.]

ENTER:

HYMAN W. GAMSO
Clerk.

Entered April 15, 1971

APPENDIX D

Order and Opinion of Supreme Court, Bronx County

At a Special Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of Bronx, at the Courthouse, 161st Street and Grand Concourse, Bronx, New York, on the 23rd day of July, 1970.

PRESENT:

The Hon. Isidor Dollinger,

Justice

PEOPLE OF THE STATE OF NEW YORK

-against-

SAMUEL CAVALIERI,

Defendant.

The defendant above named having been convicted of violation of Section 215.50 of the Penal Law Criminal Contempt in the County of Bronx, State of New York, on the 26th day of June, 1970, and said defendant having received a sentence of one year in the New York City Correctional

Institution for Men and said defendant having appealed from said judgment of conviction and sent to the Appellate Division, First Judicial Department, and having moved this Court at Special Term, Part I, for a certificate that in its opinion there is a reasonable doubt that the judgment of conviction and sentence against him should stand and for an order admitting the said defendant SAMUEL CAVALIERI to bail pending the hearing and determination of his appeal and said motion having duly come on in Special Term, Part I, of this Court on the 9th day of July, 1970, and the motion having been heard by the Court

Now, upon reading and filing the Notice of Motion dated the 29th day of June, 1970, the affidavit of Joseph Panzer duly sworn to the 29th day of June, 1970, and upon all the proceedings heretofore had herein and with due proof of service of the application for a Certificate of Reasonable Doubt upon the District Attorney of Bronx County all in support of said application and after hearing Joseph Panzer, attorney for defendant, in support of said application and Harvey Kaminsky, Assistant District Attorney, Burton Roberts, District Attorney, in opposition and due deliberation having been had and upon the filing of the decision of the Court, it is

Ordered that the motion for a Certificate of Reasonable Doubt whether the judgment convicting the defendant of the crime of a violation of Section 215.50 Criminal Contempt should stand by reason of the fact that there are arguable questions of law for review by the Appellate Court and it is further

Ordered that the said defendant SAMUEL CAVALIERI be admitted to bail during the pending of the appeal herein upon

the furnishing of a proper bond or undertaking in the sum of $1,000.00.

ENTER:

s/ ISIDOR DOLLINGER
J.S.C.

APPENDIX E
Order of Court of Appeals Entered Nov. 11, 1970

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of November in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur November 17, 1971.

BE IT REMEMBERED, That on the 21st day of June in the year of our Lord one thousand nine hundred and seventy-one, Samuel Cavalieri, the appellant in this cause, came here unto the Court of Appeals, by Joseph Panzer, his attorney —, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent — in said cause, afterwards appeared in said Court of Appeals by Burton B. Roberts, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Appendix E

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Arnold E. Wallach, of counsel for the appellant —, and by Mr. Albert A. Capellini, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And thereafter a motion for reargument and/or to amend the remittitur having been submitted, this Court on January 12, 1972, having denied the motion as to reargument and granted the motion as to amendment of the remittitur, this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the defendant under the Fifth, Sixth and Fourteenth Amendments were denied. The Court of Appeals held that there was no such denial of defendant's constitutional rights.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

Appendix E

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 17, 1971.

[Seal]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
Clerk.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1298

SAMUEL CAVALIERI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BURTON B. ROBERTS
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Bronx County
Attorney for Respondent
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Bronx, New York 10451

DANIEL J. SULLIVAN
Executive Assistant District Attorney

ALBERT A. CAPELLINI
Assistant District Attorney

Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1298

SAMUEL CAVALIERI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order, as amended, of the Court of Appeals of the State of New York entered November 17, 1971 [29 N.Y. 2d 762], unanimously affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered April 15, 1971, modifying on the law (i.e., from a multiple count conviction to a single contempt conviction) and otherwise affirming a judgment of the Supreme Court of Bronx County rendered June 26, 1970, convicting the petitioner, after a non-jury trial, of twenty-

five counts of the misdemeanor of Criminal Contempt [N.Y. Penal Law, §215.50], and sentencing the petitioner to serve a term of one year in the New York City Correctional Institution for Men. He is presently at liberty on bail pending determination of this application.

The Questions Presented

In our view there are no substantial federal questions in this case.

Statement of the Case

A raid upon a Bronx gambling establishment on November 11, 1968, prompted a grand jury investigation, during which the petitioner Samuel Cavalieri was called as a witness. After being sworn on March 7, 1969, Cavalieri gave his name and address to the first query, but when asked the next question (*i.e.*, about what his business or occupation was), he replied, "I refuse to answer on the grounds that it may tend to incriminate me" (114).* Whereupon, the petitioner was asked by the prosecutor to leave the grand jury room (*ibid.*).

After his return to that room, Cavalieri was advised by the prosecutor about the nature of the grand jury's probe, namely, to determine "* * * whether there has been a conspiracy to violate the gambling laws, loan-sharking, taking of money illegally, and putting them into legitimate business in Bronx County" (115). Immediately following that advisement, Cavalieri commenced to voice a claim of

* References are to the printed record on appeal to the New York State Court of Appeals.

privilege under the Fifth Amendment, but he was quickly reminded that he had not as yet been asked a question (*ibid.*).

Next, the prosecutor informed the petitioner that the grand jury had voted to immunize him, after which the assistant district attorney went on to explain, in essence, that Cavalieri, who was not "a target" of the investigation, would receive immunity, except for prospective perjurious or contumacious conduct before the investigatory group:

> "I tell you now, the Foreman of the Grand Jury has told me to tell you that the Grand Jury has voted to give you immunity. Now when the Grand Jury votes to give you immunity, it means if you are directed to answer questions by the Foreman of the Grand Jury, and since you have been granted immunity, anything you say under oath, and you have been sworn as a witness before the Grand Jury, cannot be used in evidence against you. It also means if you say anything that we can get a lead from, that may hurt you in some criminal way, that cannot be used in evidence against you.
>
> "So that in effect you cannot be prosecuted because of anything you say. There are two things the Grand Jury cannot give you immunity for. Perjury, and Criminal Contempt. By that I mean, when you answer questions, you must answer them truthfully. If the Grand Jury should feel you answered untruthfully, and did it in a wilful manner, they could vote the crime of Perjury against you. Anything they cannot grant you—another thing they cannot grant you immunity for is Contempt.
>
> "By that I mean, you must answer the questions, because there is no reason you cannot answer the ques-

tions at this time, since you cannot be prosecuted for it. That means what you are getting before this Grand Jury, you are getting a pat. You are being walked away from any possible prosecution, for anything that you say before this Grand Jury cannot be used against you. I am telling you this so you are fully aware and realize what the circumstances are.

"You are not a target of this investigation. We are not looking specifically at you. We think you have some knowledge or information that will enable this group of people, this Bronx Grand Jury, to determine whether or not there has been violation of laws by other persons.

"Now I'm going to ask you questions. I would hope that you would cooperate to the fullest with this Grand Jury, and do your duty, and testify before this Grand Jury, in order that we may be able to have this Grand Jury intelligently, on the matters pending before this Grand Jury" (115-117).

Thereafter, a single pattern emerged (117-28). That is to say, the assistant district attorney asked a question, after which Cavalieri would voice a refusal to answer on the grounds of possible self-incrimination (*ibid.*). Then, the foreman of the grand jury would direct Cavalieri to respond to the prosecutor's question, after which the petitioner would again assert his privilege against testimonial compulsion (*ibid.*).

The just-described recalcitrance on the part of Cavalieri ultimately led to his indictment for twenty-seven counts of Criminal Contempt.

When told inside the grand jury room that immunity was being conferred upon him, Cavalieri did not understand

the relevant concept (*id.* 203). The petitioner refused to answer questions posed by the prosecutor, and Cavalieri wanted the aid of counsel, albeit he did not request such assistance and none was offered him (*id.* 205-6). Moreover, the petitioner failed to understand the questions that were put to him (*id.* 206).

On cross-examination, Cavalieri acknowledged that he had been subpoenaed several times to appear before the relevant deliberative body prior to March 7, 1969, on which occasions he was not actually called as a witness (*id.* 209-12). However, during the period between receiving the first subpoena and March 7th, petitioner did not obtain an attorney, for he did not think he needed such help prior to the date just mentioned (*id.* 212-14). On that day, however, he was unable to understand all of the prosecutor's questions, with the result that Cavalieri then decided he needed a lawyer (*id.* 214-16). Prior to that time, the petitioner Cavalieri did not know that he had the right to be represented by an attorney (*id.* 238).

As a consequence of his conduct before the aforesaid body of inquest, Samuel Cavalieri was later charged, in a twenty-seven count indictment with the crime of Criminal Contempt. After a non-jury trial before a judge, who voiced his decision from the bench, petitioner was convicted of twenty-five of the counts, but a single sentence was meted out.

During the trial, Cavalieri took the stand on his own behalf. According to the petitioner, on the day he appeared before the relevant investigatory body, he had a conversa-

tion outside the grand jury room with an assistant district attorney. At that time, Cavalieri allegedly asserted that he had no counsel present, to which plaint the prosecutor reportedly answered: " 'It makes no difference. You going in today' " (203). The petitioner went on to plead for an opportunity to get a lawyer, but the prosecutor denied that request (*ibid.*).

ARGUMENT

POINT ONE

Petitioner was offered immunity co-extensive with the right of silence guaranteed under the Fifth and Fourteenth Amendments to the Federal Constitution and wilfully refused to answer the questions.

Petitioner asserts that he did not receive a full and fair notice of the grant of transactional immunity at the time of his grand jury appearance and hence cannot be deemed to have "wilfully" refused to answer the queries when he invoked his Fifth Amendment privilege against self-incrimination employing the classical formulation for "taking the Fifth". He does not claim that the relevant statute [Section 619-c of the Code of Criminal Procedure, superseded 9/1/71 by Criminal Procedure Law] fails to supplant the Fifth Amendment right of silence with an "immunity" that is as co-extensive as the fundamental right [see, *Counselman* v. *Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110, 12 S. Ct. 195 (1892)].

At the outset, we note that owing to the fact that the aforesaid statutory prescription has been construed to be

not self-executing [*People* v. *DeFeo*, 308 N.Y. 595 (1955)], the issue of the adequacy of the notice, as posed herein, has come within the purview of New York State's highest tribunal on several occasions in unrelated cases [see, *i.e.*, *People* v. *Mulligan*, 29 N.Y. 2d 20 (1971); *People* v. *Tramunti*, 29 N.Y. 2d 28 (1971); *People* v. *Masiello*, 28 N.Y. 2d 287 (1971)]. In each situation the inquiry has been the same, to wit, did the accused receive "full and fair notice" of the grant of transactional immunity. Hence, Cavalieri's plaint is in a true sense uniquely confined to the particular facts of his case, a situation, we suggest, of little moment to future cases [see the new Criminal Procedure Law of the State of New York, Article 50 and §190.40, which hopefully will tend to eliminate the problem discussed herein].

Beyond these preliminary remarks, it should be observed that in New York a person can not be legally convicted of the crime of contempt if the immunity advisement does not adequately apprise him of the grant of transactional immunity even though he had not been misled by the pertinent recital [*People* v. *Mulligan, supra; People* v. *Tramunti, supra; People* v. *Masiello, supra*]. This *per se* rule apparently provides a defendant tried in New York with a greater safeguard than in other jurisdictions and, perhaps, affords him a broader protection in a criminal proceeding than is mandated under the Federal Constitution. In any event, once the advisement has been adjudged to have conferred the proper immunity, the question of misleading becomes a matter of defense at trial.

Aside from the fact that the Court of Appeals found the pertinent recital of the immunity grant to petitioner to conform with language approbated in an earlier decision

of that tribunal [see, *People* v. *Mulligan, supra*], it is implicit in the affirmance of the judgment of conviction that Cavalieri had not been misled by the advisement, a plaint that was raised as a defense at trial [see, *People* v. *Masiello, supra*]. Thus, petitioner, as the trial court properly concluded, "* * * chose a course of conduct which was deliberate, planned and contumacious beyond a reasonable doubt" [see, Appendix A]. In short, Cavalieri has failed to even raise a substantial constitutional question worthy of this Court's consideration [*Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963); *United States* v. *Johnston,* 268 U.S. 220, 227 (1925)].

POINT TWO

Petitioner was not denied the right to counsel when he appeared before the grand jury.

The claim voiced herein, *i.e.*, that petitioner was denied the assistance of counsel, was rejected by the trial court and the intermediate appellate court. The trial court found the plaint unbelievable inasmuch as petitioner had been subpoenaed several times to appear before the grand jury and at no time during his actual appearance did he express a need for the assistance of counsel while he steadfastly refused to answer any questions using the classical formulation for invoking his Fifth Amendment privilege [see, Appendix A]. As the trial judge's finding was affirmed by the intermediate appellate court [36 A.D. 2d 284 (1st Dept. 1971)], New York State's Court of Appeals had no power to review the issue [see, *People* v. *Robles,* 27 N.Y. 2d 155, 157 (1970); *People* v. *Yukl,* 25 N.Y. 2d 585, 588 (1969); *People* v. *Leonti,* 18 N.Y. 2d 384, 389 (1966), *cert. den.* 389

U.S. 1007 (1967); *People* v. *Eisenberg,* 22 N.Y. 2d 99 (1968)]. Ultimately, then, the issue as raised herein, to wit, did the petitioner request the aid of counsel, turns solely upon an analysis of the particular facts of the case and is not the type of subject matter usually reviewed by this Court [*United States* v. *Johnston, supra*].

Nothing in the foregoing exposition should be construed to mean that Cavalieri under the proper circumstances was not entitled to the aid of counsel. The decision in *People* v. *Ianniello* [21 N.Y. 2d 418 (1968), cert. den., 393 U.S. 827 (1968)] is informative on the subject of the extent to which the right to counsel attaches in grand jury proceedings. The cited case establishes the witness' right to be excused from the grand jury room to consult with his lawyer about "a proper matter", such as the relevancy of a particular question to the subject matter of the investigation. Incidentally, much of the petitioner's argumentation at this time simply points up the ways that an attorney might be helpful to a witness circumstanced in the relevant context, considerations recognized by the Court of Appeals in *Ianniello* but hardly helpful in resolving the instant case. Be that as it may, *Ianniello* also requires the existence of a *bona fide* issue as to the pertinency of a question as to a prerequisite for excusing the witness from the grand jury room in order to consult with his attorney. Finally on this score, the opinion under discussion declares that the denial of a request to consult with his counsel does not give a witness a license to commit perjury or contempt; rather the witness must persist in his refusal to answer, thereby forcing the prosecutor to seek a judicial ruling in open court.

Turning back to the instant case, no claim was ever made by Cavalieri that his resort to the constitutional protection against self-incrimination had been voiced to challenge the "scope" of the immunity being conferred upon him. Moreover, the petitioner does not now take umbrage with the finding below that the grand jury probe was a legitimate investigation. By proving that Cavalieri was apprised about the "scope" of immunity, a subject discussed *supra*, and about the purpose of the grand jury's investigation, the prosecution made out a *prima facie* case, as we have seen, and the petitioner's plaints about being uneducated and thus unable to understand what was happening before the investigatory body constituted matters of defense at trial.

The trial judge rejected the proffered defense, and that jurist had, we submit, a legally sufficient basis for so doing as the appellate court below held [see *People* v. *Saperstein*, 2 N.Y. 2d 210 (1957)]. Of course, the trial court and the intermediate court rejected the defendant's claim about a prosecutor denying his request for counsel on the day of Cavalieri's appearance before the grand jury. That action was justifiable on two grounds.

Firstly, the prosecutor's action did not, *per se*, deprive the petitioner of the assistance of counsel, due to the fact that Cavalieri had been called several times before testifying, and thus had ample opportunity to obtain the help of a lawyer. Under such circumstances, it may not be said that Cavalieri was unfairly forced to make decisions in the enforced absence of counsel, a type of wrong which the courts rightfully will not sanction [see *People* v. *Ianniello*, *supra*;

Matter of Conlon v. *Murphy*, 24 A.D. 2d 737 (1st Dept. 1965)].

Secondly, the trial judge may have disbelieved the petitioner's relevant assertions as part and parcel of that jurist's rejection of Cavalieri's general credibility. For the record as a whole belies the petitioner's claim about his inability to understand the grand jury proceedings. Illustrative is the fact that Cavalieri manifestly had no difficulty in articulating his constitutional privilege, and the fact that he failed to signify, by asking for the help of counsel or otherwise, that he was unable to understand what was happening before the grand jury. Also, Cavalieri did not explicitly claim at trial that his taciturnity stemmed from a desire for an attorney's help. Insofar as *Ianniello* is concerned in this respect, the comments therein about seeking a judicial ruling presuppose that the refusal to answer is intertwined with an unheeded but proper request to the grand jury for an opportunity to consult with counsel—a context critically different from the instant setting. Viewing the trial court's relevant ruling as a resolution of credibility, then, no basis for disturbing his determination has been demonstrated.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent

DANIEL J. SULLIVAN
Executive Assistant District Attorney

ALBERT A. CAPELLINI
Assistant District Attorney
Of Counsel

May, 1972

Appendix A

The Decision at the Trial Court Level

The defendant has been charged with twenty-seven criminal contempts in an indictment tried before this Court without a jury which, in substance, alleged that defendant refused to answer questions put to him before a grand jury after having been granted immunity.

The People's case consisted of testimony which established the authority of the November, 1968 "B" Grand Jury which was held over to and including March of 1969, as well as the testimony of the acting foreman with regard to the nature and relevance of the investigation and the grant of immunity which was given to the defendant, a witness duly subpoenaed to appear before that body.

It appears that the Grand Jury was investigating gambling and usury violations and was initiated from a raid which took place on November 11, 1968, at a location in the northeast Bronx where several arrests were made and contraband seized.

The Grand Jury transcript which was placed into evidence without objection disclosed that defendant was called as a witness, responded with his name and address and then refused to answer any further questions. He was excused and upon being recalled, was told that the Grand Jury had conferred immunity upon him, was requestioned and refused to answer the next twenty-seven questions put to him, which are the individual counts of the indictment.

The defendant took the stand in his behalf upon this trial and testified that he did not have benefit of counsel, had no knowledge of the legal consequences of immunity and was told by an assistant district attorney that he did

not need counsel. *The Grant of Immunity*: The power of a grand jury to confer immunity in a gambling conspiracy investigation is statutory, (Section 619-e, Code of Criminal Procedure, subdivision "i").

Clearly, the statutory purpose of granting immunity to one person so as to gain evidence against others mandates that the grand jury be allowed to do so (Matter of Gold v. Menna, 25 N.Y. 2d 475). In that case the alleged crimes being investigated were conspiracy to commit murder, not enumerated in the Code of Criminal Procedure specifically. The Court of Appeals, however, recognized the usefulness of the immunity grant by the Grand Jury as a weapon to seek out the truth. To hold otherwise would pervert the very purpose of a grand jury's existence.

Relevance and Materiality: Defendant has raised the issue of the relevance and materiality of the questions posed to defendant and cites People v. Miranda, a decision of the Queens Supreme Court dated March 24, 1970. The distinguishable features between that case and the case at bar is that in the former there was a general investigation and "indiscriminate summoning of witnesses with no definite object in view". In the instant case, testimony was produced at the trial which established the specific aims of the Grand Jury and how these aims related to the defendant as a witness before the Grand Jury. The relevance of the questions need not be conclusively established but it is enough if the bearing of the questions on the subject of the investigation was susceptible of intelligent estimate (Matter of Koota v. Colombo, 17 N.Y. 2d 147). The legality and propriety of a question is a question of fact which the triers of the facts,—in this case the Court,—must determine (People v. McAdoo, 45 Misc. 2d 664).

Applying the standards as set forth above, the Court makes the following rulings with regard to each count of the indictment: 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, guilty beyond a reasonable doubt. As to counts 7th and 16th, not guilty.

Right to Counsel: The Court would like to note that the defendant, upon direct examination, testified that he did not have the benefit of counsel when called as a witness before the grand jury. The testimony herein showed that defendant made more than one appearance before that body and twenty-seven separate occasions used the following words: "I refuse to answer on the grounds that may tend to incriminate me." These exact words coming from the mouth of a person who now claims ignorance and near illiteracy clearly belies that argument and the Court rejects it completely as specious. At no time did the defendant ask permission to go out of the grand jury room to consult with any counsel nor in any other manner indicate that he did not know exactly what he was doing. This is not a case where defendant is being victimized because of denial of the right of counsel by law enforcement officials.

It is unquestionable that defendant chose a course of conduct which was deliberate, planned and contumacious beyond a reasonable doubt (247-51).